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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 403 404

GEORGE ASHWANDER et al.,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY et al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

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OPINIONS BELOW.

Opinion of District Court on motion to dismiss bill, 8 Fed. Supp. 893; on motion to dissolve restraining order, 9 Fed. Supp. 800; at conclusion of argument on final submission, 9 Fed. Supp. 965.

Conclusions of Law by District Court: Record, Vol. II, pp. 1091-1101. These conclusions reflect the basic facts involved in the controversy, entered pursuant to Equity Rule 70½ (II-1035), which were not modified by the Circuit Court of Appeals.

Opinion of Circuit Court of Appeals, July 17, 1935: Record, Vol. II, following page 1304.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered July 17, 1935. There was no petition for rehearing. The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1935, C. 229, 43 Stat. 938, 28 U. S. Code, Sec. 347.

CONSTITUTION AND STATUTES.

The basic questions rest on the lack of constitutional authority in the federal government, for non-federal use:

—to establish and operate in state domain a permanent commercial business, utility in type, intentionally, directly and necessarily monopolizing and regulating local electric service and rates;

—to engage in an organized proprietary business of manufacturing electricity at war-purpose steam-electric plants for commercial distribution and sale in state domain;

—to install and operate hydro-electric units in navigation dams for the manufacture of electricity by the government for commercial distribution and sale in state domain.

Constitution:

Article I, Sec. 1;
Article I, Sec. 8, Cl. 12, limiting appropriations for stated war purposes for a longer term than two years;
Article IV, Sec. 3, Cl. 2.
Amendments V, IX, X.

Tennessee Valley Authority Act of 1933, 48 Stat. 58, 16 U. S. C. 831. (The amendment which passed House and

Senate August 21, 1935, emphasizes and does not dispose of any questions discussed.)

Section 124, National Defense Act (C. 34, 39 Stat. 215).

Declaratory Judgment Act of June 14, 1934 (C. 512, 48 Stat. 955; 28 U. S. C. 400; Judicial Code, Sec. 274 D).

STATEMENT.

An outline of the case, the facts and controversy, appears in the petition for certiorari.

PROPOSITIONS AND PRINCIPAL AUTHORITIES.

(1)

Permanent commercial operation by the government of a proprietary business of manufacture and sale within State domain of a commodity for private consumption in competition with citizens is not a legitimate function of the federal government. Such business can not, without violation of the Tenth Amendment, be licensed or regulated or operated by the federal government under a pretense of disposing of federal property, where the commodity is commercially manufactured for that purpose.

Constitution: Amendment IX, Amendment X.

See *South Carolina v. United States*, 199 U. S. 437, quoting the language of Chief Justice Nott:

> "Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the

Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

Ashwander v. Tennessee Valley Authority, 8 Fed. Supp. 893; 9 Fed. Supp. 965;
Speed v. United States, 75 U. S. 77 (1868);
License Tax Cases, 5 Wall. 462;
Kansas v. Colorado, 206 U. S. 89.

As to the invasion of the rights reserved to the States and the people under the guise of commerce or tax powers:

Employers Liability Cases, 207 U. S. 463 (1908);
Hammer v. Dagenhart, 247 U. S. 251;
Child Labor Tax Case, 259 U. S. 38;
Hill v. Wallace, 259 U. S. 44;
Trusler v. Crooks, 269 U. S. 475;
Linder v. United States, 268 U. S. 5.

This invasion is comparable to the effort to take property under the guise of regulation (a) or performance of international obligations (b).

(a) *Penna. Mining Co. v. Mahon,* 260 U. S. 393;
(b) *International Paper Co. v. United States,* 282 U. S. 399.

That the commercial manufacturing business in competition with citizens is alien to federal function seems conceded by the Circuit Court of Appeals.*

So little effort has been made by the government in a century and a half to manufacture commodities for commercial sale or render services beyond the range of federal domain or use (except as ineidental to liquidation of a war plant—*Clallam County v. Spruce Corporation,* 263

*"Of course, it is true that the Government of the United States cannot engage at will in private business."

U. S. 41) that the solitary expression grazing the commercial manufacturing process seems to be this statement in *United States v. Speed*, 75 U. S. 77 (1868):

> "If by this is meant that the War Department has no authority to enter into the business of converting hogs into pork, lard and bacon, for the purposes of profit or sale as individuals do, the proposition may be conceded * * *."

(2)

The disciplining and regulation of local utilities, the promotion of public ownership of utilities, the desire to supplement regulation by State authorities and State processes, the general desire to promote the industrial, social and economic welfare of the public in state domain in matters reserved to the States, are not functions of the federal government, however exigent they may be deemed by Congress.

Cases cited, supra;
Schechter Poultry Co. v. United States, 79 L. ed. Adv. 888;
Railroad Retirement Board v. Alton Ry., 79 L. ed. Adv. 803, 55 Sup. Ct. 758;
Missouri v. Holland, 252 U. S. 416.*

In the *License Tax Cases*, supra, the sharp line between the business of the citizen and the federal government is asserted in these words:

> "No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the Legisla-

*"It is obvious that there may be matters of the sharpest exigency for national well being that an Act of Congress could not deal with." Per Holmes, J.

ture. The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject";

and in *Kansas v. Colorado,* the Court asserted that the Tenth Amendment

> "disclosed widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that Act."

The findings of the District Court, conceded to be correct by the Circuit Court of Appeals, to the effect that the electricity intentionally manufactured by Tennessee Valley Authority for commercial distribution and sale within state domain through a business permanent in character and utility in type, is not in aid or furtherance of any federal use or necessary to the preservation of the plants (No. 43, II-1048), result in the necessary conclusion that the plan, program and mechanism of TVA to that end are violative of the Tenth Amendment.

(Findings No. 73, II-1061; 104 and 106, II-1072; 118, II-1079);
(Conclusions Nos. 2, 4, 5, 6, 7, 8, 12, II-1091 et seq.)

(3)

The principle of the State-Business Tax Cases that such businesses are proprietary and not governmental is applicable where the commodity is manufactured not for Govment use but, intentionally, for commercial sale.

The principle announced in the state-business tax cases (*South Carolina v. Un. S.*, 199 U. S. 437; *Ohio v. Helvering*, 292 U. S. 360; *Helvering v. Powers*, 79 L. Ed. Adv. Op. 141) that proprietary business is not governmental in character plainly requires that the federal government, in discharging its constitutional functions, be restricted in engaging in proprietary transactions or making use of commercial mechanism to such devices as are in furtherance of a constitutional function; that is, in the case of manufacturing confined to the supply of government requirements and in the case of sales to bona fide left-overs not intentionally created for commercial sale.

The cases cited, involving the conduct by a state or its sub-divisions of a proprietary business, assert that a proprietary business is not a governmental function, although, as to the states, the business may be sufficiently public in character to be justified under the reserved or residuary powers of state or local governments and authorized by the particular state constitution.

Jones v. Portland, 245 U. S. 217;
Green v. Frazier, 253 U. S. 233;
Puget Sound L. & P. Co. v. Seattle, 291 U. S. 619.

The line of cases first cited, holding that operation of a state proprietary business of buying (or manufacturing) and selling, or like continuing commercial transactions, is so essentially proprietary and non-governmental as to be sub-

ject to federal taxation, is necessarily to be distinguished from the bona fide, non-commercial sale, disposition or liquidation by the state or federal governments of public property or a governmental agency, as to which a sale, merely liquidating the ownership, would not be taxable, any more than the original purchase for government use, as represented by *Indian Motorcycle Co. v. United States,* 283 U. S. 570; *Clallam County v. Spruce Corporation, supra.*

The use of a spent-purpose or future-purpose war plant in a commercial manufacturing business to earn profit for the treasury is obviously proprietary, non-sovereign and non-governmental, and therefore beyond the lawful power of the government. This is true not merely as to the steam plants at Muscle Shoals, but as to the use of surplus waters (actually vested in the State) as a raw material out of which to manufacture electricity in a hydro-electric plant as a permanent business.

The intentional acquisition or manufacture of a commodity for commercial sale for profit or other non-federal objective can not, under the cases above cited, following *South Carolina v. U. S.,* be regarded as governmental. For this reason the commercial transaction or business, if justified at all as to the federal government, must have a direct and rational relationship to an express constitutional function thought to be subserved.

The Muscle Shoals Acts of 1928 (S. 46) and 1930 (S. 49), which failed for lack of Executive approval, as in the case of the present Act and the current amendment, alike directly contemplated commercial and proprietary manufacture and sale of commercial fertilizer and electricity, without relation to and in flagrant violation of federal powers.

(4)

There is a vital distinction between operation of a commercial business by a private business corporation created or adopted as a federal agency, and operation of such business by the government. The necessity for earning profit is not a governmental necessity, however definitely that function may be related to and required for survival of the corporate agency.

The case presented by this record in all of its aspects is the case of direct federal operations, or operations by no-recourse agencies financed and controlled by the government, not the case of a private corporation adopted by Congress, to which competitive commercial powers may be granted in order to enable the corporation to compete and survive.*

It can not be contended that Congress could arrogate to the government itself competitive functions merely because considered necessary or desirable by Congress to enable the government to earn money. The doctrine of reasonable relationship would not apply.

Even in the case of federal agency corporations privately owned and operating for profit, Chief Justice Marshall asserted that the corporate powers granted must have relation to the federal objective,† and the present administration has been warned by the Attorney General that where a corporate agency is made use of its corporate powers must be limited to the federal objective.‡

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*First National Bank v. Fellows, 244 U. S. 415; Missouri v. Duncan, 265 U. S. 17.

†Osborne v. Bank, 9 Wheat. 738, 860.

‡Op. Att'y. Gen. Feb. 7, 1934, and Oct. 21, 1933, to Hon. Harold L. Ickes, Federal Emergency Administrator of Public Works.

(5)

The desire for revenue does not authorize the federal government to engage in business to earn it.

The tax clause (Art. I, Sec. 8, Cl. 1), the Sixteenth Amendment, and the property clause (Art. IV, Sec. 3, Cl. 2) prescribe, in general, the means by which and the conditions under which the government is authorized to provide funds. These means do not include a commercial manufacturing business for the production of commodities, to be sold throughout state domain. Obviously, the government having under a substantive power created a plant or instrumentality, can lease it, pending reserved use of future final disposition, and may reserve rent or compensation for the use. *U. S. v. Gratiot*, 14 Pet. 526.

In the case of lawful instrumentalities provided for public use within a lawful power it may presumably charge tolls; but in all such cases the creation or operation of the property must have been pursuant to a federal function and not be dominantly based on desire to realize money for the treasury.

(6)

Commercial operation of the steam-electric and hydro-electric plants to manufacture electricity for distribution and sale to the public in state domain is not a legitimate federal function.

The findings of the District Court adequately state the complete lack of relationship between commercial manufacture and sale of electricity at and from the various steam-electric plants or at and from the existing and prospective hydro-electric plants, and improvement of navigation or war or preservation of the plants (Findings Nos. 43, 73, 91, 104, 106, II-1048 et seq.).

The conclusions of law announced by the District Court follow inevitably from these facts (Concl. Nos. 2, 4, 7, 12, 13, 15, II-1091 et seq.).

The final decree of the District Court had no effect on any navigation aspects of the TVA program. If affirmed and extended so as to terminate finally any proprietary manufacture and sale of electricity, either at the steam plant or dam, it would have no remote effect on the improvement of navigation or upon interstate commerce.

(7)

The property clause of the Constitution (Art. IV, Sec. 3, Cl. 2) does not contemplate or authorize the commercial operation of a federal purpose plant for the manufacture of new commodities or the processing by the government of federal raw materials into finished products to be sold throughout state domain in competition with citizens.

The property clause is found in the Constitution not among the legislative powers but among the clauses dealing with the relations between the state and federal governments.

> "Clearly it does not grant to Congress any legislative control over the States; and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."
>
> *Kansas v. Colorado*, 206 U. S. 89.

The direct and necessary result of the power claimed by TVA is the antithesis of state jurisdiction.

The elimination of state licensed utilities and the substitution of the power of the federal government to control the business, by dictating the terms and conditions upon

which utility service may be had, can not possibly be considered other than a direct interference with the state under a pretense of disposing of or regulating government property.

Local utility service is affected with a local and not a national public interest and is wholly a state function. To hold that the federal government can compete with and thereby destroy, through its superior resources and their untaxed and unregulated administration by a three man corporation, this duty and responsibility of the state or its subdivisions to its own citizens, would wreck the principle of state sovereignty.

The findings and conclusions of the District Court aptly and accurately distinguish between the ownership and disposition (such as by lease or sale) of government lands and property, and the use of government property to organize and engage in a manufacturing business in state domain (Nos. 9 and 10, II-1093).

Conduct of a permanent business is not a function of disposal of property. "The United States can not hold property as a monarch may for private or personal purposes." *Van Brocklin v. Anderson*, 117 U. S. 158. Such properties are held in trust for all of the people. *U. S. v. Trinidad Coal Co.*, 137 U. S. 160.

These principles necessarily exclude the use of federal properties as a competitive means with which to annihilate private business within a region or a city arbitrarily selected by an agent of the government for federal monopoly or control of the business.

The distinction between static ownership or stand-by ownership (lease) and engaging in business with property is well established. *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187. *

So also is the distinction between providing and making

* The facts distinguishing (a) manufacturing, (b) the function of transmission and sale asserted in Utah P.&L. Co. Pfost, 286 U.S. 165 (Petition for Cert., p. 16), and (c) lease of government plant, were stated by the District Court (Fng. No. 36, II-1045; Concl. No. 10, II-1093) and

available an instrumentality in aid of commerce, to be used by others, and engaging in commercial business by means of the instrumentality. *Detroit International Bridge Co. v. Appeal Board,* 79 Adv. Op. 337; *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150.

Subject to the question of good faith in acquiring plants to lease rather than for a federal purpose, there would be no objection to the lease by the government of the emplacements in navigation dams (as has been done at Boulder Dam* and at the Kanawha Dams†) or of the Muscle Shoals steam plant, as was done by the War Department, or the hydro-electric units.

There have been compensatory offers for the lease of the Muscle Shoals property, which have been declined (Finding No. 92, II-1069). The government declines to lease these plants or even to sell the output of these plants at the plant (II-543, Finding No. 113, II-1078). It insists upon direct commercial manufacture by the government in order to conduct a business in state domain (II-1042, No. 26 et seq.).

This is not disposing of or making rules and regulations respecting the territory and other property belonging to the United States, viz., the steam plant, the emplacements and the hydro-electric units, within the meaning of Article IV, Sec. 3, Cl. 2. It is conducting the business both of manufacture and sale, involving plant, working capital, technical organization, personnel, promotion, all in order to acquire a commodity not owned by the government and not desired for government use but for proprietary sale. There would be no constitutional difference between commercial manufacture of a commodity for sale and purchasing it for sale. In fact, the TVA is shown on this record

*The Hoover Dam Contracts, Wilbur and Ely, Gov't Ptg. Off. 1933.
†Report Fed. Power Comm. 1934, p. 147, Project No. 1175.

to have entered into contract to purchase electric power for resale in this business (II-1078, No. 116).

The range of and the limitations upon the property clause as demonstrable from the transactions of the Convention of 1787 and the decisions of this court warrant no such use of the so-called war and navigation plants.

In general, the organization and operation of a permanent business designed and intended to have its impact on local service in state domain and to accomplish a permanent monopoly and control of that service can not be justified as a legitimate means for regulating or disposing of the property of the United States. The plan and program of TVA is basically and intrinsically, as well as by design and intent, monopolistic and permanent and wholly beyond the legitimate scope of Art. IV, Sec. 3, Cl. 2.

(8)

Where the dominant objective of an Act of Congress or a transaction undertaken by the Federal Government (TVA) is to regulate intrastate utilities and otherwise directly to control matters reserved by the Ninth and Tenth Amendments from federal interference, the Act or transaction is illegal, notwithstanding its form or its recitals, even if the mechanism employed, separately and intrinsically considered, involved an act otherwise or ordinarily or superficially within the scope of federal power.

The record in this case, the findings of fact made by the District Court not in any respect modified by the Circuit Court of Appeals, and the consistent and unqualified admissions in the record, excerpted from the corporate minutes and official releases of TVA, make plain that the dominant and primary purpose of the TVA program was and is the establishment of a permanent, independent util-

ity network in state domain as a yardstick over or to regulate utilities, to supplement state regulation and to promote public or cooperative ownership. All overt acts and transactions were plainly designed to that end, and to drive out existing utilities as a designed or proximate and necessary result.

Under these circumstances, the principles of interpretation either applied or recognized in the cases cited below make both the Act and the program subject to the test of validity supplied by the stated dominant objective and purpose. "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government."

McCulloch v. Maryland, 4 Wheat. 316, 423 (1819);
Linder v. U. S., 268 U. S. 466 (1925);
Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922);
Hill v. Wallace, 259 U. S. 366 (1925);
Trusler v. Crooks, 269 U. S. 475;
Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924);
Magnano Co. v. Hamilton, 292 U. S. 40 (1934);
Nigro v. United States, 276 U. S. 332;
United States v. One Ford Coupe, 272 U. S. 32;
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429.*

In declining or failing to give consideration to this integral and dominant function of the TVA program, the Circuit Court of Appeals declined to accept that which, in removing the cause, the TVA recognized as involved and directly presented for consideration and decision, viz, the integral TVA program in its entirety. The controversy presented, as asserted by TVA:

"(5) The legality of the entire program of the re-

*"It is the substance, and not the form, which controls, as has indeed been established."

spondent Tennessee Valley Authority under the Tennessee Valley Authority Act and the Constitution of the United States."

—(Petition for Removal, I-210)

The District Court made appropriate findings and conclusions upon the issue thus admitted. The Circuit Court of Appeals declined this major issue, although summarizing (without disapproval) with approximate correctness certain findings of the District Court, in these words:

> "It is not the purpose of TVA to limit the production of electric power to that needed by the Government in manufacturing war materials and providing for navigation, but its declared policy is to utilize to the fullest extent possible all the electric energy which the Wilson and other dams are capable of producing, by supplying first governmental needs, and then by selling the surplus to users of electricity, in competition with public utility corporations engaged in the manufacture, transmission, and distribution of electricity. In disposing of surplus power TVA intends to obtain revenue, but at the same time to undersell its private competitors in order to establish a 'power yardstick' and to demonstrate the advantages of public over private ownership of electric light plants."

The failure of the Circuit Court of Appeals to consider the question of the dominant effect of these and related findings of fact departs from the principle of the decisions cited, which have resulted in an express clarification of the *Doremus Case*, 249 U. S. 86, as recognized in *Nigro v. United States*, 276 U. S. 332.

(9)

The opinion of the Circuit Court of Appeals has misinterpreted the effect of the Kaukauna Water Company (142 U. S. 254), Green Bay (172 U. S. 58), Chandler-Dunbar (229 U. S. 53) and Boulder Dam (283 U. S. 423) cases in asserting that those cases have adjudicated that the federal government under the Commerce Clause acquires a proprietary interest in the surplus waters impounded by navigation dams; and has departed from the principles established in Kansas v. Colorado, 206 U. S. 89, Wisconsin v. Illinois, 278 U. S. 367, and in the settled line of decisions represented by Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U. S. 1, 43, and Port of Seattle v. Oregon-Washington Ry., 255 U. S. 56, and recognized in Section 9 of the Federal Water Power Act of June 10, 1920, 41 Stat. 1063, 16 U. S. C., Sec. 791.

The cases cited in the caption sustain the assertion there stated. That the proprietary right of the state is subject only to manipulation of the waters of navigable streams by Congress in relation to the regulation of navigation is recognized in the latest expressions of the Court. *United States v. Arizona*, 79 L. ed. Adv. 681, 685, 55 Sup. Ct. 666.

That the use of surplus waters of a stream, that is, by definition, waters not required to be manipulated in furtherance of navigation, vests in perpetuity in the States in trust for the people is of all doctrines relating to waters the most firmly established by elaborate and consistent consideration and decision by this Court. Upon that line of decisions rests a rule of property of the first rank. The decision of the Circuit Court of Appeals shatters it.

The preemption of the waters by the government pending or assuming State acquiescence adds nothing to its existing lack of Constitutional power to engage in the busi-

ness of manufacture and commercial distribution, whatever the raw material, by whomsoever owned.

The argument of TVA, adopted by the Circuit Court of Appeals; that surplus waters are *sui generis* has no constitutional significance. They were *sui generis* in *Kansas v. Colorado*, 206 U. S. 89, and in *Pollard v. Hagan*.

The government could not condemn a *proprietary* right to use the surplus waters for *commercial* manufacture and distribution. It can not take that right by treaty with the State (*Pollard v. Hagan*, supra), nor under Section 10570, Code of Alabama (1923) (*U. S. v. Fox*, 94 U. S. 34; *State v. Alabama Power Co.*, 176 Ala. 620). It could, of course, take the right for war purposes or manipulate the pool levels in aid of navigation; but to take the waters or water rights fo. commercial manufacture and sale of power under guise of regulation of commerce would be nothing short of a prostitution of federal power, condemned in *International Paper Co. v. United States*, 282 U. S. 399, as, in *Penna. Coal Co. v. Mahon*, 260 U. S. 393, was condemned the effort to enlarge a subordinate easement actually held by the public into a dominant and much greater one desired, under the guise of regulation. The Court said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change."

The State of Alabama by formal action both of its Legislature and an appointed Commission has asserted the proprietary right of the State in the waters of the Tennessee within its borders not necessary to be manipulated for navigation.*

*(Act No. 40, Feb. 10, 1927, Acts 1927, p. 38; Sen. Doc. No. 31, 70th Cong., 1st Sess., Jan. 4, 1928, p. 31; Mobile Trans. Co. v. City of Mobile, 153 Ala. 409).

The State of West Virginia has asserted like rights. *United States v. West Virginia*, 79 L. ed. 848.

The rights of the State of Arizona to its equitable share of those waters at Boulder Dam not necessary to be dispatched for navigation and flood control have been recognized. They have not, as erroneously assumed by the Circuit Court of Appeals, been foreclosed in favor of the commercial manufacture of power by the United States or its assigns. The Boulder Dam Case (*Arizona v. California*, 283 U. S. 423) suggested no such result; nor did *United States v. Arizona*, 79 L. ed. Adv. 681, 55 Sup. Ct. 666.

The State of New York has from the outset asserted proprietorship in surplus waters not required to be manipulated for improvement of navigation; and the rights of that State have been tacitly recognized by the Administration and the House of Representatives.†

This is not a case where one citizen is relying upon unauthorized diversion of another's property or right. It so happens that the Alabama Power Company owns the Wheeler Dam site (Decree, Section 3, I-383), but that point is not material or decisive. Whether the government owns a proprietary right or not, in coal or water, that right can not be made the basis of a permanent manufacturing business to produce a commodity for commercial sale by the government throughout state domain.

†(H. J. Res. 157, 73rd Cong., 1st Sess., passed without amendment April 26, 1933, Cong. Rec., p. 2441; Report No. 49, April 20, 1933; Joint Memorandum, U. S. Engineers and New York Power Authority, February 7, 1933.)

(10)

The TVA program is in derogation of fundamental characteristics of the federal government and limitations upon the power of Congress.

The Tennessee Valley Authority Act is unconstitutional in relation to the power program and, by reason of interdependence of its parts, in its entirety.

The amendment of the Tennessee Valley Authority Act (August, 1935) emphasizes the invalidity of the program and transactions involved on this record and the invalidity of the Act as amended.

These captions for brevity may be discussed jointly.

The Act and program constitute a phenomenon without parallel in the history of the government. The Message of the President requesting the creation of the Tennessee Valley Authority* makes plain that the conception was to give a board of three men discretion to commit the government permanently and irretrievably to a region-wide collectivist enterprise, legislative both in the conception delegated and in detail.

The necessity for condensing this statement makes it possible merely to schedule the result.

1.

The functions proposed are essentially non-governmental and inconsistent with the theory of the Constitution and the characteristics of the federal government

*Exhibit 2 to Bill of Compaint, I-106.

A continuing utility servitude, subjecting the federal government to the continuing duty to supply without interruption service to every citizen, whether wholesale or retail, enforced by contract, involving the reading of meters, selling appliances, repairing service, engaging in promotion, and cluttering the processes of federal legislation and administration with the details, is alien to the theory of the American government. There is no express power to support it. Any implication of authority to so remarkable an end is opposed by the nature and functions of the government.

Any such servitude constitutes on its face an interference with the functions of the national government. The theory on which immunity to suit is based, subject to suspension in the interest of justice where governmental functions unavoidably result in injury, is directly opposed to the exposure of the government to routine commercial litigation.

The permanent commitment of the government to any such program is in derogation of the legislative power, of the power and duty to be free to dispose of government property, of the duty to raise revenue under the tax powers where the citizen is protected by the provisions and restraints of the Constitution, rather than by commercial monopoly and unregulated engrossing of utility service, directed by three arbitrary directors whose statutory test of fealty to the plan (Act, Sec. 2-h) is itself violative of Art. IV, Cl. 2 of the Constitution.

2.

The Act delegates to TVA unlimited discretion as to:

(1) The determination of the power program, its location, conduct, the selection of the areas in which and the

extent to which its utility operation, domination and control, its regulation of rates, its promotion of public ownership, may be exercised; the utilities it may single out for competitive exclusion; the extent to which federal funds shall be invested in extension of the program out of United States bonds and out of net revenue or existing appropriations; the determination of the question of utility relationship between the government and the States and municipalities, and like questions of grave legislative policy: all being determined at will by TVA.

(2) The extent to which TVA shall (as in the case proposed as to the seventeen municipal defendants) finance distributing systems without pecuniary liability on the municipality, supply with power, dominate and control rates, accounts, service regulations and revenue, and require the resulting systems to be operated for account of the government.

(3) The discretion to commit the government to 20-30 and 50 year actionable supply contracts, thus effectively freezing the policy, the property and the plants of the government against withdrawal or repeal, except on making compensation.

(4) The discretion to depart from the recommendations of the Corps of Engineers as to depth of navigation, location and type of navigation dams, and of storage dams; whether and to what extent hydro-electric emplacements should be provided and, if provided, whether to equip them with commercial units and put them in business in competition with existing utilities; whether and to what extent steam-electric units shall be built or electricity purchased in the market for resale.

(11)

The Tennessee Valley Authority Act is invalid in respect to its provisions authorizing competitive manufacture and distribution of electricity in that, as construed and applied by TVA, it purports to delegate arbitrary discretion to TVA to single out the Alabama Power Company or any other utility for competitive destruction, for arbitrary and oppressive action.

As construed and applied by TVA, the Act constitutes a letter of marque authorizing TVA to make war on utilities serving the public within transmission distance of any source of electricity. Although the rate schedules in force with the Alabama Power Company were shown on this record to have been acknowledged to be reasonable by Tennessee Valley Authority and by it stipulated for extension into the State of Tennessee by Tennessee Electric Power Company, the record shows systematic abuse and incitation of the public in the area by TVA against utilities. Representative illustrations proven on this record are: (II-639; I-165; Fng. No. 117, II-1078).

The Act vests TVA with exclusive control over the power plants at Muscle Shoals and Wilson Dam and at all future plants and properties (Sec. 7-a). Section 10 authorizes distribution of this power at the sole discretion of TVA. Section 11 declares a policy of equitable distribution in the area within transmission distance; but the record shows that TVA follows no plan or program except an arbitrary determination to entrench as comprehensively as possible this permanent network. In the course of that procedure it has singled out the Alabama Power Company for competitive attrition of its seventeen municipal distribution systems, after taking an option upon them at 60% of the replacement value stipulated in the agreement of January 4, 1934.

The power program as announced and as administered is conspicuously arbitrary and inequitable.

Provisions urged by the House requiring judicial condemnation of systems marked out for destruction, both in the original Act and in the Amendment, were eliminated and the principle of TVA discretion left without condition.

The inauguration and regulation of utility service is a legislative function. The death sentence upon utilities inherent in the Act as construed and administered by TVA brings the Act and its administration within the principle of *Yick Wo v. Hopkins*, 118 U. S. 356. The Fifth Amendment is plainly violated by the procedure disclosed by this record. That procedure faces all utilities in the area.

This is not a case where the government is offering commodities for sale at the point of possession or manufacture on public domain, viz., at the steam plant or dam. This is a case where TVA is given arbitrary power to erect a transmission line into any utility area it selects, with no standard or instruction: in short, the full power of Congress and the discretion of private enterprise as to a permanent policy from which there is no practicable retreat.

TVA is accountable not even to the remote political control of the people. The determination of policy by TVA is final. That means arbitrary three-man, corporate domination, as fatal when it concentrates on seventeen municipal areas as the concentration of checks in *American Trust & Savings Bank v. Federal Reserve Bank*, 256 U. S. 359.

No such arbitrary power and discretion can be justified by an administrative agency of the federal government.

The circumstances of unfair advantage, use of federal resources, and of public incitation to force a non-federal result are tantamount not merely to competition but to a taking without compensation in violation of the Fifth Amendment, as plainly as was involved in *International*

Paper Co. v. United States, 282 U. S. 399, or attempted in violation of the Fourteenth Amendment, in *Penna. Mining Co. v. Mahon, supra.*

It is respectfully submitted that analysis of this record will disclose systematic administrative procedure without precedent for arbitrary conduct in support of the most ominous departure of the federal government undertaken in its history.

If these powers exist, it is incredible that they could lie dormant and unsuspected from 1787 until the Muscle Shoals Acts of 1928 and 1930, which failed of executive approval, ripened into the program of federal government by corporation, with unlimited power and discretion, accomplished by the Tennessee Valley Authority Act of 1933.

(12)

Declaratory Relief.

The scope of this brief will not permit explanation of petitioners' right to declaratory decree in this controversy (deferred or pretermitted by the District Court, II-1101, No. 27) to protect the corporation against the obvious alternatives confronting it in the shifting by TVA of the means of making effective its utility competition, either directly or through active and continuing employment and control of federal funds, agencies and investments, which, by reason of their controlled and continuing impact leave them justiciable and distinguishable from *Massachusetts v. Mellon*, 262 U. S. 447, and *Arkansas-Missouri Power Co. v. City of Kennett* (U. S. C. C. A.-8th, August 15, 1935).

However debatable may be considered the power of Congress to appropriate moneys for non-federal ends, no one supposes that under appropriate challenge the federal government can itself continue to execute and administer the

non-federal objective (such as a no-recourse municipal distributing plant, financed, dominated, controlled and operated for the benefit of the Government). There is nothing static or accomplished in that situation. It is working and continuing, in aid and furtherance of illegal, competitive, proprietary operations by the federal government, in privity with and controlled by TVA and plainly actionable under the principle of

(a) *Frost v. Corp. Comm. of Okla.*, 278 U. S. 515;
Arkansas-Missouri Power Co. v. City of Kennett, supra;
City of Campbell v. Ark.-Miss. Pow. Co., 55 F. (2d) 560; *Et passim;*

(b) *Marbury v. Madison*, 4 Wheat. 423;
Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548, 569.

Respectfully submitted,

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